

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): SADOT, Emek	Conf. No.: 2558
Application No.: 10/072,364	Art Unit: 2194
Filed: February 6, 2002	Examiner: ANYA, Charles
Title: CLIENT-CONTROLLED LOAD BALANCER	

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICANT'S BRIEF IN REPLY TO EXAMINER'S ANSWER

Sir:

Applicant submits this Brief in Reply to Examiner's Answer to address certain salient issues raised in the Examiner's Answer mailed August 18, 2010. Applicant maintains all arguments presented in Applicant's Appeal Brief, and the failure to respond to each statement in the Examiner's Answer should not be construed as agreement with such statement or a waiver of any previously presented argument.

All claims stand rejected under 35 U.S.C. 103(a) based on a combination of two or more references. However, the primary reference fails to satisfy at least one limitation of each claim. MPEP 706.02(j) indicates that an examiner should identify a "modification of the applied reference(s) necessary to arrive at the claimed subject matter" in order to support a rejection under 35 U.S.C. 103(a). The Examiner's Answer asserts that he has satisfied this requirement by "referencing" a secondary reference in

each rejection (Examiner's Answer, pp 34, 36, 38 and 40). It is respectfully submitted that "referencing" a secondary reference does not constitute an identification of a modification to a primary reference. The Examiner's Answer does not address the deficiencies of the rejections of record, and Applicant maintains that a prima facie case of obviousness has not been presented in connection with any claim for the reasons provided in Applicant's Appeal Brief.

The Examiner's Answer indicates (page 34) that Brendel's client side load balancer has knowledge of server loads because round trip time or latency to an intended server may be measured. It is not clear how this statement is relevant to Applicant's arguments. However, it is respectfully submitted that round trip time or latency to an intended server is a measure of network delay and does constitute knowledge of the load of any server. To the extent that any rejection is based on this statement, such rejection is respectfully traversed.

The Examiner's Answer attempts to rebut a non-analogous art argument (page 35). In five and one-half years of prosecution and three Appeal Briefs, Applicant has not made a non-analogous art argument. This argument is a straw man and has no bearing on the issues in this case.

The Examiner's Answer indicates (page 35) that patentability cannot be established by attacking references individually. Applicant agrees. In a similar manner, obviousness cannot be established by merely locating all claim elements¹ individually in a plurality of references. *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) ("...a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art").

¹ This is not an admission that the examiner has in fact located every claim element in the prior art.

Instead, the record must explain what modification to a reference is being proposed and must provide some reason that a person of ordinary skill in the art would have made that modification. Unless the record contains some reason for modifying a primary reference, a rejection under 35 U.S.C. 103(a) cannot be maintained.

For the foregoing reasons, and the reasons presented in Applicant's Appeal Brief, it is respectfully submitted that the record does not present a prima facie case of obviousness in connection with any claim. Wherefore, the withdrawal of all rejections and the allowance of all claims is again earnestly solicited.

Respectfully submitted,

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